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5 **NOT FOR PUBLICATION**

6 IN THE UNITED STATES DISTRICT COURT

7
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 LUXPRO CORPORATION, a Taiwanese
10 corporation

No. C 10-03058 JSW

11 Plaintiff,

12 v.

13 APPLE INC. f/k/a Apple Computer, Inc.,

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS THE SECOND
AMENDED COMPLAINT**

14 Defendant.
15 _____ /

16 **INTRODUCTION**

17 Now before the Court for consideration is the motion to dismiss filed by Defendant
18 Apple Inc. ("Apple"). The motion is fully briefed and ripe for decision. Having considered the
19 parties' papers, the relevant legal authority, and the record in this case, the Court GRANTS IN
20 PART AND DENIES IN PART Apple's motion to dismiss and GRANTS Luxpro leave to
21 amend the Second Amended Complaint ("SAC").

22 **BACKGROUND**

23 **A. Factual Background.**

24 Plaintiff Luxpro Corporation ("Luxpro") and Apple both manufacture and sell MP3
25 players. (SAC ¶¶ 1-2, 10, 27.) From 2003 to 2006, Luxpro entered into a number of
26 distribution agreements with, and received orders from, distributors, suppliers, and retailers for
27 its MP3 products. (SAC ¶¶ 30-33.) Venture capital firms and outside investors were interested
28 in investing in Luxpro. (SAC ¶ 34.) Due to Luxpro's growth in business, Luxpro prepared its

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1 stock to be publicly traded on the Gre-Tai Securities Market, a Taiwanese public stock
2 exchange. (SAC ¶ 35.)

3 In February 2005, Luxpro developed a prototype MP3 player called the “Super Shuffle”
4 that was intended to compete with Apple’s MP3 player, the “iPod Shuffle.” (SAC ¶ 37.)
5 Following the introduction of the Super Shuffle at a trade show in Germany in March 2005,
6 Apple sought and received an injunction against Luxpro in Germany, and Luxpro was ordered
7 to abandon use of the word “shuffle” in its product name. (*Id.*) Luxpro complied and changed
8 its product name to the “Super Tangent.” (*Id.*) In August 2005, Apple sought and received a
9 preliminary injunction in Taiwan based on allegations that Luxpro’s MP3 players too closely
10 resembled Apple’s iPod Shuffle. (SAC ¶ 39.) The Taiwanese court prohibited Luxpro from
11 manufacturing, distributing, or marketing three of its MP3 players in the “Tangent” line. (*Id.*)
12 Luxpro successfully appealed, and the Taiwanese court reversed the injunction for all of
13 Luxpro’s products, except the one product that previously contained the term “shuffle.” (SAC
14 ¶ 41.) Apple unsuccessfully appealed the reversal of the injunction. (SAC ¶¶ 42, 45.) Apple
15 also filed a complaint with the Taiwanese Fair Trade Commission, alleging that Luxpro violated
16 Taiwan’s Fair Trade Act by selling products that were confusingly similar to Apple’s products,
17 but the Taiwanese Fair Trade Commission ruled against Apple. (SAC ¶ 46.)

18 Luxpro alleges that after Apple received the preliminary injunction in Tawian, and while
19 Apple’s appeals were pending with the Taiwanese court and the Taiwanese Fair Trade
20 Commission, Apple “continued to threaten Luxpro’s distributors and retailers to the point where
21 they could not afford to do business with Luxpro any longer.” (SAC ¶ 48.) Luxpro alleges that
22 Apple threatened Luxpro’s commercial partners with the same type of litigation that Apple filed
23 against Luxpro, and alleges that Apple threatened to deny access to Apple products if Luxpro’s
24 distributors continued to do business with Luxpro. (SAC ¶ 40.) Luxpro alleges that Apple
25 made misrepresentations and disparaging statements about Luxpro’s products, causing Luxpro’s
26 customers, retailers, and distributors to stop doing business with Luxpro. (SAC ¶ 49.) Luxpro
27 also alleges that Apple “spread the word throughout the industry that Luxpro was selling cheap
28 ‘knock-offs’ and cheap and illegal copies of Apple’s iPod products.” (SAC ¶ 40.)

B. Procedural History.

On October 14, 2008, Luxpro filed a complaint in the United States District Court for the Western District of Arkansas (the “Arkansas District Court”), and filed an amended complaint in that court on October 20, 2008. (Docket Nos. 1, 6.) On December 19, 2008, Apple moved to dismiss Luxpro’s First Amended Complaint (“FAC”). (Docket No. 23.) On September 28, 2009, the Arkansas District Court entered an order granting in part and denying in part Apple’s motion to dismiss, with leave to amend the FAC (“the September 28 Order”). *Luxpro Corp. v. Apple, Inc.*, 658 F. Supp. 2d 921, 936 (W.D. Ark. 2009). Luxpro filed the SAC on December 29, 2009. (Docket No. 62). In the SAC, Luxpro asserts the following causes of action: (1) intentional interference with prospective economic advantage; (2) intentional interference with contractual relations; (3) violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); (4) commercial disparagement; and (5) violation of California Business and Professions Code §§ 17200, et seq. (the “Section 17200 claim”). On July 7, 2010, the case was transferred to this Court. (Docket No. 83.) Apple now moves to dismiss the SAC. (Docket No. 141.)

ANALYSIS

A. Applicable Legal Standard.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). However, even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at

1 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the
2 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
3 *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).
4 “The plausibility standard is not akin to a probability requirement, but it asks for more than a
5 sheer possibility that a defendant has acted unlawfully. . . . When a complaint pleads facts that
6 are merely consistent with a defendant’s liability, it stops short of the line between possibility
7 and plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal
8 quotation marks omitted). If the allegations are insufficient to state a claim, a court should
9 grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*,
10 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*,
11 911 F.2d 242, 246-47 (9th Cir. 1990).

12 As a general rule, “a district court may not consider any material beyond the pleadings
13 in ruling on a Rule 12(b)(6) motion.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994),
14 *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir.
15 2002) (citation omitted). However, documents subject to judicial notice may be considered on a
16 motion to dismiss. In doing so, the Court does not convert a motion to dismiss to one for
17 summary judgment. *See Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986),
18 *overruled on other grounds by Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104
19 (1991).

20 **B. The Court Grants Apple’s Request For Judicial Notice.**

21 Apple filed a request for judicial notice in conjunction with its motion to dismiss, by
22 which it seeks judicial notice of orders from the Taiwanese and German courts. Apple seeks
23 judicial notice of the foreign court orders on the basis that Luxpro references the orders in the
24 SAC. “Courts may only take judicial notice of adjudicative facts that are ‘not subject to
25 reasonable dispute.’” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (quoting Fed.
26 R. Evid. 201(b)). Under the “incorporation by reference” doctrine, courts may consider
27 documents that are “referenced extensively in the complaint and [are] accepted by all parties as
28 authentic.” *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

1 Luxpro objects to the foreign court orders and argues that its asserted claims are not based on
2 those rulings. However, Luxpro seeks relief for economic loss that occurred to Luxpro when
3 Luxpro was “forced to stop all production, manufacturing, advertising and marketing” because
4 of the injunctions. (SAC ¶ 41.) Therefore, many of Luxpro’s claims rely on the fact that Apple
5 successfully sought the foreign injunctions against Luxpro. Luxpro also argues that the orders
6 are inaccurate because they are unauthenticated. However, the foreign court orders were
7 submitted by translators who certified under penalty of perjury that they translated true and
8 correct copies of the orders and that they have provided true and correct copies of their
9 translations. (*See Declaration of Michael Hofhine in Support of Apple’s Motion to Dismiss*
10 (“*Hofhine Decl.*”) at 1-2; *Declaration of Meihua Shi in Support of Apple’s Motion to Dismiss*
11 (“*Shi Decl.*”) at 1-2.) This is sufficient to certify the documents’ accuracy. *See* 28 U.S.C.
12 § 1746; *Commodity Futures Trading Com’n v. Topworth Intern., Ltd.*, 205 F.3d 1107, 1112 (9th
13 Cir. 1999). Therefore, the Court GRANTS Apple’s request for judicial notice.

14 **C. The *Noerr-Pennington* Doctrine Does Not Completely Protect Apple’s Conduct.**

15 Apple moves to dismiss the SAC in its entirety on the basis that Apple is immune from
16 liability because the *Noerr-Pennington* doctrine protects Apple’s pursuit of the foreign
17 injunctions against Luxpro as well as Apple’s alleged threats to Luxpro’s commercial partners.
18 In response, Luxpro argues that the *Noerr-Pennington* doctrine does not protect any of Apple’s
19 alleged conduct. Under the *Noerr-Pennington* doctrine, those who petition the government for
20 redress are generally immune from antitrust, statutory, or tort liability as part of the First
21 Amendment right to petition the government. *Theme Promotions, Inc. v. News America Mktg*
22 *FSI*, 546 F.3d 991, 1007 (9th Cir. 2008); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir.
23 2006) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127
24 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)). The *Noerr-Pennington*
25 doctrine protects a party’s effort to petition the government in litigation, unless the litigation is
26 “is a mere sham to cover what is actually nothing more than an attempt to interfere directly with
27 the business relationships of a competitor.” *California Motor Transport Co. v. Trucking*
28 *Unlimited*, 404 U.S. 510, 511 (1972) (internal quotation omitted). In addition to protecting

1 alleged harms caused by a legitimate lawsuit, the *Noerr-Pennington* doctrine also protects
2 conduct that is “incidental to the prosecution of the suit.” *See Sosa*, 437 F.3d at 949 (internal
3 quotation omitted).

4 **1. The Arkansas District Court’s Prior Ruling on the *Noerr-Pennington*
5 Doctrine.**

6 In the September 28 Order, the Arkansas District Court concluded that the *Noerr-*
7 *Pennington* doctrine protects some, but not all, of Apple’s alleged conduct. *Luxpro*, 658 F.
8 Supp. 2d at 927-29. In the FAC, Luxpro claimed that it lost product orders and valuable market
9 opportunities due to the lawsuits Apple filed in Germany and Taiwan. Luxpro also claimed that
10 Luxpro’s commercial partners terminated their business relationships with Luxpro, after Apple
11 sent letters to Luxpro’s commercial partners threatening them with potential lawsuits and
12 pressuring them to discontinue their business relationships with Luxpro. Regarding the
13 litigation in Germany and Taiwan, the Arkansas District Court determined that the two lawsuits
14 were not mere shams because Apple succeeded in obtaining the injunction in Germany and the
15 preliminary injunction in Taiwan. *Id.* at 928; *see also Omni Resource Development Corp. v.*
16 *Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984) (holding that a lawsuit was not objectively
17 baseless regardless of the ultimate outcome because the court granted a preliminary injunction).
18 Regarding Apple’s threat letters, the Arkansas District Court reasoned that because Apple sent
19 the letters after it received the injunctions, Apple’s conduct was not incidental to the
20 prosecution of the foreign litigation. *Id.* at 929. Therefore, the *Noerr-Pennington* doctrine did
21 not protect Apple’s “post-litigation conduct,” *i.e.* Apple’s alleged threats to Luxpro’s
22 commercial partners. *Id.*

23 Both parties rely in part on the Arkansas District Court’s conclusion that the *Noerr-*
24 *Pennington* doctrine protects some, but not all, of Apple’s conduct to support their respective
25 positions. Luxpro relies on the Arkansas District Court’s conclusion that the *Noerr-Pennington*
26 doctrine does not protect Apple’s alleged threats to Luxpro’s commercial partners, but it now
27 argues that the *Noerr-Pennington* doctrine also does not protect Apple’s pursuit of the foreign
28 lawsuits, including the complaint Apple filed with the Taiwanese Fair Trade Commission.

1 Apple relies on the Arkansas District Court’s conclusion that the *Noerr-Pennington* doctrine
2 protects Apple’s pursuit of the foreign lawsuits, but it now argues that the *Noerr-Pennington*
3 doctrine also protects Apple’s alleged threats to Luxpro’s commercial partners.

4 **2. The *Noerr-Pennington* Doctrine Protects Apple’s Pursuit of the Injunctions
5 in Germany and Taiwan.**

6 In opposition to Apple’s motion to dismiss, Luxpro asserts that Apple is not immune
7 from liability for the harms to Luxpro caused by Apple’s lawsuits in Germany and Taiwan,
8 because the lawsuits fall within the “sham exception” to the *Noerr-Pennington* doctrine. To
9 determine whether litigation is a sham, a court considers whether: (1) the lawsuit is “objectively
10 baseless” such that “no reasonable litigant could realistically expect to succeed on the merits;”
11 and (2) it is the subjective intent of the litigant to “interfere directly with the business
12 relationships of the competitor.” *Professional Real Estate Investors, Inc. v. Columbia Pictures
13 Industries, Inc.*, 508 U.S. 49, 60-61 (1993). “If an objective litigant could conclude that the suit
14 is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and
15 an antitrust claim premised on the sham exception must fail.” *Id.* at 60. In its SAC, Luxpro
16 fails to allege any new facts that would indicate that Apple’s lawsuits in Germany and Taiwan
17 were objectively baseless. Absent such facts, this Court finds no basis to reconsider the
18 Arkansas District Court’s conclusions that the *Noerr-Pennington* doctrine protects Apple’s
19 pursuit of the injunctions in Germany and Taiwan. *See Luxpro*, 658 F. Supp. 2d at 928.
20 Therefore, the Court concludes that the sham exception does not apply to Apple’s lawsuits in
21 Germany and Taiwan.

22 Luxpro also argues that Apple’s lawsuits in Germany and Taiwan fall within the
23 “pattern exception” to the *Noerr-Pennington* doctrine. Under the pattern exception, a party is
24 not immune from liability when the party brings a series of meritless lawsuits. *USS-POSCO
25 Indus. v. Contra Costa County Bldg. & Const. Trades*, 31 F.3d 800, 811 (9th Cir. 1994). The
26 inquiry then becomes whether a “series of lawsuits . . . are brought pursuant to a policy of
27 starting legal proceedings without regard to the merits and for the purpose of injuring a market
28 rival.” *Id.* However, if a defendant prevails in more than half of its lawsuits, it is unlikely that

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1 the lawsuits are meritless. *See id.* (“The fact that more than half of all the actions . . . turn[ed]
 2 out to have merit cannot be reconciled with the charge that the [defendants] were filing lawsuits
 3 and other actions willy-nilly without regard to success.”). Because Apple succeeded in
 4 obtaining the injunction in Germany and the preliminary injunction in Taiwan, the lawsuits
 5 were not meritless. Furthermore, although Apple brought multiple actions against Luxpro,
 6 Apple’s two foreign lawsuits and its complaint filed with the Taiwanese Fair Trade Commission
 7 do not constitute a “series of lawsuits.”¹ *Compare Amarel v. Connell*, 102 F.3d 1494, 1519 (9th
 8 Cir. 1995) (holding that two lawsuits was not “a whole series of legal proceedings” or a “pattern
 9 of baseless, repetitive claims”); *Coca-Cola Co. v. Omni Pac. Co.*, 1998 U.S. Dist. LEXIS
 10 23277, at *24 (N.D. Cal. Dec. 9, 1998) (concluding that four lawsuits did not constitute a series
 11 of lawsuits), *with USS-POSCO*, 31 F.3d 800, 811 (determining that twenty-nine lawsuits
 12 constituted a series of lawsuits). Accordingly, the Court concludes that the pattern exception
 13 does not apply to Apple’s foreign litigation.

14 Lastly, Luxpro argues that Apple’s foreign litigation is not immune because the *Noerr-*
 15 *Pennington* doctrine does not protect actions undertaken in foreign countries. Although it
 16 appears that the Ninth Circuit has not addressed whether the *Noerr-Pennington* doctrine
 17 protects parties’ efforts to petition foreign governments, the Fifth Circuit has held that it does.
 18 In *Coastal States Marketing, Inc. v. Hunt*, the Fifth Circuit reasoned, “[t]he Sherman Act, as
 19 interpreted by *Noerr*, simply does not penalize as an antitrust violation the petitioning of a
 20 government agency.” 694 F.2d 1358, 1366 (5th Cir. 1983). Therefore, according to the Fifth
 21 Circuit, a party should not be held liable for conduct that would be legal and protected if it was
 22 performed in the United States, but is now illegal because it was performed abroad. *Id.* The
 23 Court finds the Fifth Circuit’s reasoning persuasive. *See also Coca-Cola*, 1998 U.S. Dist.
 24 LEXIS 23277, at *28-*30 (finding *Coastal States Marketing* persuasive and concluding that the
 25

26 ¹ Luxpro claims that Apple’s appeals in the Taiwanese court count as a separate
 27 action in the “series of lawsuits.” The Court is not aware of any cases, nor does Luxpro cite
 28 any cases, that support the notion that the Court should count appeals as a separate
 proceeding. *Cf. Kaiser Foundation Health Plan, Inc. v. Abbott Labs., Inc.*, 552 F.3d 1033,
 1046 (9th Cir. 2009) (including unsuccessful appeals in the same litigation as the lawsuit
 filed in the district court for purposes of the pattern exception).

1 Noerr-Pennington doctrine applies to petitions to foreign governments.) Therefore, the Court
2 concludes that the Noerr-Pennington doctrine also protects parties' efforts to petition foreign
3 governments.

4 Accordingly, the Court grants, in part, Apple's motion to dismiss on this basis.

5 **3. The Court Cannot Conclude That the Noerr-Pennington Doctrine Protects
6 Apple's Alleged Threats to Luxpro's Commercial Partners.**

7 In its motion to dismiss, Apple asserts that Luxpro's SAC should be dismissed in its
8 entirety because, in addition to protecting Apple's efforts to seek redress from the courts in
9 Germany and Taiwan, the Noerr-Pennington doctrine also protects Apple's alleged threats to
10 Luxpro's commercial partners. Apple contends that its letters warned Luxpro's commercial
11 partners about potential lawsuits that Apple would bring if the companies continued to sell
12 Luxpro's products. Therefore, according to Apple, the letters are incidental to the prosecution
13 of a lawsuit and are protected by the Noerr-Pennington doctrine. The Ninth Circuit has held
14 that the Noerr-Pennington doctrine immunizes parties who send pre-litigation demand letters
15 warning a potential adversary about the possibility of a lawsuit, because such communications
16 are "conduct incidental to the prosecution of the suit." *Sosa*, 437 F.3d at 939 (internal quotation
17 omitted); *see also Theme Promotions*, 546 F.3d at 1008. In *Sosa*, the Ninth Circuit adopted the
18 First Amendment's "breathing space" principle from free speech cases and applied it to the
19 petitioning context. *Sosa*, 437 F.3d at 933-34. Under the breathing space principle, the First
20 Amendment protects conduct that does not fall within the protection of the speech clause in its
21 own right, but must be protected to adequately safeguard the freedom of speech. *Id.* at 933. In
22 the petitioning context, "to exercise its petitioning rights meaningfully, a party may not be
23 subjected to liability for conduct intimately related to its petitioning activities." *Id.* at 934. The
24 Ninth Circuit noted that, consistent with the breathing space principle, it had previously
25 recognized that the Noerr-Pennington doctrine also protects "conduct incidental to the
26 prosecution of the suit." *Id.* at 934-35 (citing *Columbia Pictures Indus., Inc. v. Prof'l Real*
27 *Estate Investors, Inc.*, 944 F.2d 1525, 1528-29 (9th Cir.1991)).

1 Although Luxpro alleges facts that suggest that Apple's threats and demands made to
 2 Luxpro's commercial partners may include pre-suit demand letters, Luxpro also makes some
 3 allegations that Apple generally threatened Luxpro's commercial partners to stop doing
 4 business with Luxpro without suggesting the possibility of a lawsuit or mentioning the
 5 enforcement of any intellectual property rights. These threats are distinguishable from the pre-
 6 suit demand letters in *Sosa* because, as alleged, the threats do not mention any potential
 7 litigation or enforcement of intellectual property rights. Thus, the Court cannot conclude that
 8 all of Apple's threats were "incidental to the prosecution of a lawsuit." Therefore, the Court
 9 concludes that at this stage in the litigation, Apple is not entitled to immunity under the *Noerr-*
 10 *Pennington* doctrine for sending allegedly threatening letters to Luxpro's commercial partners.

11 Accordingly, the Court denies, in part, Apple's motion to dismiss on this basis.

12 **D. Luxpro States a Claim for Intentional Interference with Prospective Economic
 13 Advantage for Some, But Not All, of Luxpro's Commercial Partners.²**

14 Apple asserts that Luxpro fails to state claims for intentional interference with
 15 prospective economic advantage with various retailers, distributors, and suppliers, as well as
 16 thirty-six specifically named entities.³ To state a claim for intentional interference with
 17 prospective economic advantage, a plaintiff must show: (1) an economic relationship between
 18 the plaintiff and some third party, with the probability of future economic benefit to the

20 ² The thirty-six specifically named entities are: Elecom, Co. Ltd, Japan
 21 Airlines, Nikko VC, Seitec Corporation, Beijing Big Boss, Longda Tech., AboCom Systems,
 22 Golden View, Co., Ltd., Gaijah International, DataPool Systems, Best Buy, Radioshack, Wal-
 23 Mart, and Starbucks Corporation, Circuit City Stores, Inc., Bruder Products, Ltd., Fatech
 24 Co., Dai-Daichi Denki, TKEC 3C, ET-Mall TV Shopping, Kaga Electronics, Limited,
 25 Orchard Co., WebWorker, Carrefour, InterTAN Canada, Ltd., Tounsen Corporation, Beijing
 26 Huaqi Informational Digital Technology Co., Ltd., Beijing Qian Kun Time Digital
 27 Technology Co., Ltd., TCL Digital Electronics, Victor Japan, Ltd., Laos Co. Ltd., N.A.K.S.
 28 Asia Limited, Funai Europe UK Representative, Keller Trading AB, Boardman Inc., and
 Twister Sound Pty Ltd.

3 Neither party distinguishes between the two distinct torts of intentional
 26 interference with contractual relations and intentional interference with prospective
 27 economic advantage. For clarity, the Court shall address each tort separately. *See Della*
Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 392 (1995) (emphasizing the
 28 difference between intentional interference with prospective economic advantage and
 intentional interference with contractual relationship and urging courts to firmly distinguish
 between the two types of business contexts).

1 plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of
2 the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and
3 (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Luxpro*, 658
4 F. Supp. 2d at 930 (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153
5 (2003)).

6 **1. Luxpro States a Claim for Intentional Interference with Prospective
7 Economic Advantage With Respect to Its Retailers, Distributors, and
Suppliers.**

8 Apple moves to dismiss Luxpro's allegations that Apple interfered with existing
9 economic relationships with its "retailers, distributors and suppliers." (SAC ¶ 7.) Apple argues
10 that, in order to satisfy the first element of the tort, Luxpro must specifically name every entity
11 with whom Apple allegedly interfered. In response, Luxpro argues that it does not need to
12 plead all acts of interference, but just enough facts to satisfy the elements of intentional
13 interference in its entirety. Under California law, "a plaintiff that wishes to state a cause of
14 action for this tort must allege the existence of an economic relationship with some third party
15 that contains the probability of future economic benefit to the plaintiff." See *Korea Supply*, 29
16 Cal. 4th at 1164. A number of courts have held that specifying a third party group is sufficient
17 to state a claim, even if the plaintiff does not individually name each member of the group. See,
18 e.g., *Lee Myles Associates Corp. v. Paul Rubke Enterprises, Inc.*, 557 F. Supp. 2d 1134, 1140-
19 41 (S.D. Cal. 2008) (alleging interference with existing franchisees and "Area Development
20 Representatives" was sufficient to state a claim); *Aagard v. Palomar Builders, Inc.*, 344 F.
21 Supp. 2d 1211, 1219 (E.D. Cal. 2004) (alleging interference with "existing customers" was
22 sufficient to state a claim); *Janda v. Madera Community Hosp.*, 16 F. Supp. 2d 1181, 1189
23 (E.D. Cal. 1998) (alleging that defendant's tortious conduct impaired economic relationships
24 with existing patients survived a motion to dismiss); *Lowell v. Mother's Cake & Cookie Co.*, 79
25 Cal. App. 3d 13, 19 (1978) (alleging that defendant intended to discourage "purchasers" from
26 purchasing plaintiff's company was sufficient to state a claim).

27 Luxpro alleges that Apple interfered with its existing "commercial partners (i.e.
28 retailers, distributors and suppliers)" who purchased, sold, and manufactured Luxpro's MP3

1 products. (SAC ¶ 7.) Luxpro alleges that Apple threatened these business partners, which
2 resulted in the cancellation of distributorship agreements, existing orders, and plans for future
3 orders. Because Luxpro specified third party groups with which it had existing business
4 relationships, Luxpro's claim is akin to the plaintiffs' claims in *Lee Myles Associates, Aagard,*
5 *Janda, and Lowell*. Thus, specifying third party groups such as retailers, distributors and
6 suppliers is sufficient to satisfy the first element of intentional interference with prospective
7 economic advantage. *See Lee Myles Associates*, 557 F. Supp. 2d at 1140-41.

8 Regarding the remaining elements, Luxpro alleges sufficient facts to state a claim for
9 intentional interference with prospective economic advantage with Luxpro's relationships with
10 its retailers, distributors and suppliers. Luxpro alleges that Apple knew of and intentionally
11 interfered with Luxpro's relationships with its distributors, retailers, and business partners, by
12 wrongfully threatening them until they ended their business relationships with Luxpro. Luxpro
13 alleges that Apple's interference caused those relationships to terminate and as a result, Luxpro
14 experienced significant economic loss, such as lost profits and other consequential damages.
15 Therefore, the Court concludes that Luxpro states a claim for intentional interference with
16 prospective economic advantage with respect to its relationships with commercial retailers,
17 distributors, and suppliers.

18 Accordingly, the Court denies, in part, Apple's motion to dismiss on this basis.

19 **2. Luxpro States a Claim for Intentional Interference with Prospective
20 Economic Advantage With Respect to Some Specifically Named Entities.**

21 Regarding Luxpro's claims for intentional interference with prospective economic
22 advantage with the thirty-six specifically named entities, Luxpro states a claim for some, but not
23 all, of the entities. First, Luxpro's allegations that Apple interfered with its relationships with
24 Elecom, Co. Ltd, Japan Airlines, and Nikko VC are insufficient to state a claim for intentional
25 interference with prospective economic advantage, because Luxpro does not allege that Apple
26 wrongfully interfered with those relationships. To state a claim, the plaintiff must allege "that
27 the defendant engaged in an independently wrongful act" apart from the interference itself.

28

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1 *Korea Supply*, 29 Cal. 4th at 1158. “[A]n act is independently wrongful if it is unlawful”
2 *Id.* at 1159.

3 Luxpro alleges that Elecom expressed interest in purchasing several thousand Luxpro
4 MP3 players, but Elecom later informed Luxpro that “because of the lawsuit with Apple, [it]
5 could not do business with Luxpro.” (SAC ¶ 53.) The Court has already determined that
6 Apple’s lawsuits in Germany and Taiwan are protected under the *Noerr-Pennington* doctrine,
7 and are therefore lawful. Thus, Luxpro does not allege any facts to show that Apple disrupted
8 Luxpro’s relationship with Elecom with an independently wrongful act. Accordingly, the Court
9 grants, in part, Apple’s motion to dismiss on this basis.

10 Regarding Japan Airlines and Nikko, Luxpro alleges that the two companies expressed
11 interest in doing business with Luxpro, but Luxpro only states that the potential deals were
12 cancelled due to Apple’s “sham litigation,” “illegal conduct,” and “illegal tactics.” (SAC ¶¶ 55,
13 58.) Again, because Apple’s foreign lawsuits were lawful, Luxpro does not allege any facts to
14 show that Apple disrupted Luxpro’s relationship with Japan Airlines and Nikko with an
15 independently wrongful act. In addition, Luxpro’s other claims that its relationships with Japan
16 Airlines and Nikko terminated due to Apple’s “illegal conduct” and “illegal tactics” are bare
17 legal conclusions unsupported by facts. Luxpro does not allege that Apple directly interfered
18 with its relationship with Elecom, Japan Airlines, and Nikko with an independently wrongful
19 act. Therefore, Luxpro’s claims for intentional interference with prospective economic
20 advantage with respect to its relationships with Elecom, Co. Ltd, Japan Airlines, and Nikko VC
21 must fail. Accordingly, the Court grants, in part, Apple’s motion to dismiss on this basis.

22
23 Further, Luxpro’s allegations with respect to Seitec Corporation, Beijing Big Boss,
24 Longda Tech., AboCom Systems, Golden View, Co., Ltd., Gajah International, DataPool
25 Systems, Best Buy, Radioshack, Wal-Mart, and Starbucks Corporation, Circuit City Stores,
26 Inc., Bruder Products, Ltd., Fatech Co., Dai-Daichi Denki, TKEC 3C, and ET-Mall TV
27 Shopping are insufficient to state a claim for intentional interference with prospective economic
28 advantage, because Luxpro does not allege that Apple’s interference caused actual disruption of

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1 the relationships. *See Korea Supply*, 29 Cal. 4th at 1153. Luxpro alleges that each of the above
2 entities either ordered Luxpro's products, requested samples, or expressed interest in selling
3 Luxpro's products. However, Luxpro does not allege that these relationships terminated as a
4 result of Apple's interference.⁴ In fact, Luxpro does not state any facts about how the
5 relationships ended at all. Therefore, Luxpro's claims for intentional interference with
6 prospective economic advantage with respect to its relationships with Seitec Corporation,
7 Beijing Big Boss, Longda Tech., AboCom Systems, Golden View, Co., Ltd., Gajah
8 International, DataPool Systems, Best Buy, Radioshack, Wal-Mart, and Starbucks Corporation,
9 Circuit City Stores, Inc. Bruder Products, Ltd., Fatech Co., Dai-Daichi Denki, TKEC 3C, and
10 ET-Mall TV Shopping must fail. Accordingly, the Court grants, in part, Apple's motion to
11 dismiss on this basis.

12 Luxpro does, however, adequately plead a claim for intentional interference with
13 prospective economic advantage with respect to its relationship with the following remaining
14 entities: Kaga Electronics, Limited, Orchard Co., WebWorker, Carrefour, and InterTAN
15 Canada, Ltd.. Regarding Orchard Co., WebWorker, Carrefour, and Kaga Electronics, Luxpro
16 cured the deficiencies identified by the Arkansas District Court in the FAC. Specifically,
17 Luxpro now alleges that it previously sold MP3 products to Orchard, WebWorker, and Kaga
18 Electronics, and that Carrefour's retail stores displayed and sold Luxpro's MP3 products in its
19 stores. These facts allege that Luxpro had a prior business relationship with these companies
20 with the probability of economic benefit. Luxpro satisfies the remainder of the elements of the
21 tort by alleging that Orchard, WebWorker, and Kaga Electronics "ended all of their business
22 relationships with Luxpro . . . based upon [Apple's] litigation threats and misrepresentations.".
23 (SAC ¶ 52.) Luxpro also alleges that Carrefour terminated its economic relationship with
24 Luxpro when it discontinued sales of Luxpro's products and cancelled existing orders and
25 distribution shipments after Apple directly threatened Carrefour to stop doing business with

26 _____
27 ⁴ Although the Arkansas District Court found that Luxpro stated a claim for
28 relief with regard to a potential joint venture with Starbucks Corporation, Luxpro does not
make the same allegations regarding Starbucks Japan in the SAC as it did in the FAC. *See Luxpro*, 658 F. Supp. 2d at 932.

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1 Luxpro. Therefore, the Court concludes that Luxpro states a claim for intentional interference
2 with prospective economic advantage with respect to its relationships with Orchard Co.,
3 WebWorker, Carrefour, and Kaga Electronics. Accordingly, the Court denies, in part, Apple's
4 motion to dismiss on this basis.

5 Lastly, Luxpro's allegations with respect to InterTAN Canada, Ltd. are sufficient to
6 state a claim for intentional interference with prospective economic advantage. Luxpro alleges
7 that it met with InterTAN about selling Luxpro's MP3s and InterTAN showed great interest.
8 Luxpro alleges that it shipped 7000 trial samples to InterTAN, and InterTAN actively promoted
9 Luxpro's products. Luxpro further alleges that once Apple "placed significant pressure on
10 InterTAN" to "drop Luxpro's MP3 players from its retail shelves," InterTAN "yanked and
11 destroyed 4500 Luxpro MP3 players" and then stopped placing orders with Luxpro. (SAC ¶
12 48.) These facts allege that Luxpro had a business relationship with a probable economic
13 benefit, Apple knowingly and wrongfully interfered with the relationship, and that the
14 relationship ended and Luxpro was harmed as a result. *See Korea Supply*, 29 Cal. 4th at 1153.
15 Therefore, the Court concludes that Luxpro states a claim for intentional interference with
16 prospective economic advantage with respect to its relationship with InterTAN Canada, Ltd.
17 Accordingly, the Court denies, in part, Apple's motion to dismiss on this basis.

18 In summary, the Court concludes that Luxpro states a claim for intentional interference
19 with prospective economic advantage with respect to its relationships with retailers, distributors
20 and suppliers, as well as Kaga Electronics, Limited, Orchard Co., WebWorker, Carrefour,
21 InterTAN Canada, Ltd.

22 The Court dismisses Luxpro's claims for intentional interference with prospective
23 economic advantage with respect to its relationships with Elecom, Co. Ltd, Japan Airlines,
24 Nikko VC, Seitec Corporation, Beijing Big Boss, Longda Tech., AboCom Systems, Golden
25 View, Co., Ltd., Gajah International, DataPool Systems, Best Buy, Radioshack, Wal-Mart, and
26 Starbucks Corporation, Circuit City Stores, Inc., Bruder Products, Ltd., Fatech Co., Dai-Daichi
27 Denki, TKEC 3C, and ET-Mall TV Shopping. Because the Court cannot say it would be futile
28

1 to grant leave to amend, the Court grants Luxpro one final opportunity to amend its claims for
2 intentional interference with prospective economic advantage with respect to these companies.

3 **E. Luxpro Fails to State a Claim for Intentional Interference with Contractual
4 Relations.**

5 Apple moves to dismiss Luxpro's claim for intentional interference with contractual
6 relations. To state a claim for intentional interference with contractual relations, a plaintiff must
7 show: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this
8 contract; (3) the defendant's intentional acts designed to induce breach or disruption of the
9 contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5)
10 resulting damage. *Luxpro*, 658 F. Supp. 2d at 930-31 (citing *Pac. Gas & Elec. Co. v. Bear
11 Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990)).

12 Luxpro fails to state a claim for intentional interference with contractual relations for ten
13 of the eleven entities with which Luxpro alleges it had distribution agreements. Luxpro alleges
14 that it had distributorship agreements with Tounsen Corporation, Beijing Huaqi Informational
15 Digital Technology Co., Ltd., Beijing Qian Kun Time Digital Technology Co., Ltd., TCL
16 Digital Electronics, Victor Japan, Ltd., Laos Co. Ltd., N.A.K.S. Asia Limited, Funai Europe UK
17 Representative, Keller Trading AB, Boardman Inc., and Twister Sound Pty Ltd., and alleges
18 that these companies all terminated their distribution agreements with Luxpro because of
19 Apple's "illegal conduct." (SAC ¶ 49.) Except for Tounsen Corporation, Luxpro does not
20 allege any facts to show that Apple knew of the relationships and intentionally and wrongfully
21 interfered with those relationships. See *Bear Stearns*, 50 Cal. 3d at 1126. Luxpro does not
22 allege any facts about how the relationships ended except that the contracts terminated because
23 of Apple's "illegal conduct," a bare legal conclusion. Therefore, the Court dismisses Luxpro's
24 claims for intentional interference with contractual relations with respect to its relationships
25 with Beijing Huaqi Informational Digital Technology Co., Ltd., Beijing Qian Kun Time Digital
26 Technology Co., Ltd., TCL Digital Electronics, Victor Japan, Ltd., Laos Co. Ltd., N.A.K.S.
27 Asia Limited, Funai Europe UK Representative, Keller Trading AB, Boardman Inc., and
28 Twister Sound Pty Ltd.

1 Accordingly, the Court grants, in part, Apple's motion to dismiss on this basis.
2 However, because the Court cannot say it would be futile to grant leave to amend, the Court
3 grants Luxpro one final opportunity to amend its claims for intentional interference with
4 contractual relations with respect to these companies.

5 Luxpro's allegations regarding Tounsen Corporation are sufficient to state a claim for
6 intentional interference with intentional interference with contractual relations. Luxpro alleges
7 that it had an existing distribution agreement with Tounsen, but that Apple knowingly forced
8 Tounsen to "drop existing contracts with Luxpro or be subject to legal recourse and also be shut
9 off from access to Apple products." (SAC ¶ 74.) These facts are sufficient to state a claim that
10 Luxpro had a contract with Tounsen, Apple knowingly and wrongfully interfered with the
11 relationship, the relationship ended, and Luxpro was harmed as a result. *See Bear Stearns*, 50
12 Cal. 3d at 1126. Therefore, the Court concludes that Luxpro states a claim for intentional
13 interference with contractual relations with respect to its relationship with Tounsen Corporation.

14 Accordingly, the Court denies, in part, Apple's motion to dismiss on this basis.

15 **F. Luxpro Fails to State a Claim for Violation of Section 43(a) of the Lanham Act.**

16 Apple contends that Luxpro's Lanham Act claim fails because Apple's alleged conduct
17 does not constitute "commercial advertising or promotion." Under the Lanham Act, a party
18 shall be civilly liable for making false or misleading representations in "commercial advertising
19 or promotion." 15 U.S.C. § 1125(a)(1)(B). A prima facie case under the Lanham Act requires
20 that the plaintiff show:

21 (1) the defendant made a false statement either about the plaintiff's or its own
22 product; (2) *the statement was made in commercial advertisement or promotion*;
23 (3) the statement actually deceived or had the tendency to deceive a substantial
24 segment of its audience; (4) the deception is material; (5) the defendant caused its
false statement to enter interstate commerce; and (6) the plaintiff has been or is
likely to be injured as a result of the false statement, either by direct diversion of
sales from itself to the defendant, or by a lessening of goodwill associated with
the plaintiff's product.

25
26 *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1052 (9th Cir. 2008)
27 (internal citation omitted) (emphasis added). "Commercial advertising or promotion" is
28 defined as:

(1) commercial speech; (2) by the defendant who is in commercial competition with the plaintiff; (3) *for the purpose of influencing consumers to buy defendant's goods or services*. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Id. at 1054 (internal citation omitted) (emphasis added). Only misrepresentations that are made in the promotion or marketing of a defendant’s product are actionable under the Lanham Act. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003) (holding that statements that were not made in promotion or marketing of a product were not actionable as commercial advertising or promotion).

Apple contends that its demand letters do not constitute “commercial advertising or promotion,” because they were not designed to influence Luxpro’s customers to buy Apple’s goods or services. The Court agrees. Although Luxpro alleges that Apple’s threat letters sought to deter Luxpro’s commercial partners from doing business with Luxpro, Luxpro does not allege that Apple tried to persuade the companies to do business with Apple. *See Zinus Inc. v. Simmons Bedding Co.*, 2007 WL 4287391, at *5 (N.D. Cal. Dec. 6, 2007) (concluding that although cease-and-desist letters might have influenced customers to refrain from purchasing plaintiff’s product, that alone was not sufficient to state a claim for false advertising under the Lanham Act); *see also, Futuristic Fences, Inc. v. Illusion Fence Corp.*, 558 F. Supp. 2d 1270, 1281 (S.D. Fla. 2008) (citing *Avery Dennison Corp. v. Acco Brands, Inc.*, 2000 WL 986995, at *8 (C.D. Cal. Feb. 22, 2000) (concluding that cease-and-desist letters “were sent by [the defendants’ attorney, not as a marketing and sales tool, but in an attempt to protect [the defendants’] legal rights”)). Luxpro does not allege any facts to show that Apple threatened Luxpro’s commercial partners to influence them to purchase Apple’s products. Therefore, the Court dismisses Luxpro’s false advertising claim.

Accordingly, the Court grants, in part, Apple’s motion to dismiss on this basis. However, because the Court cannot say it would be futile to grant leave to amend, the Court grants Luxpro one final opportunity to amend its false advertising claim.

1 **G. Luxpro States a Claim for Defamation, But Fails to State a Claim for Trade Libel.**2 In its SAC, Luxpro alleges a claim for “commercial disparagement.”⁵3 The defamatory torts of libel and slander are different than trade libel. The
4 difference between the two types of actions is that an action for defamation is
5 designed to protect the reputation of the plaintiff, and the judgment vindicates that
 reputation, whereas the action for disparagement is based on pecuniary damage
 and lies only where such damage has been suffered.6 *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968, 972 (9th Cir. 1994) (internal
7 quotation omitted). “[T]rade libel and product disparagement are injurious falsehoods that
8 interfere with business. Unlike classic defamation, they are not directed at the plaintiff's
9 personal reputation, but rather at the goods a plaintiff sells or the character of his other business,
10 as such.” *Guess, Inc. v. Superior Court*, 176 Cal. App. 3d 473, 479 (1986).11 Although Luxpro does not specify in the SAC or in its opposing brief whether it claims
12 a cause of action for defamation or trade libel, Luxpro has stated previously that it asserts both
13 claims for relief. *See Luxpro*, 658 F. Supp. 2d at 934. The Arkansas District Court dismissed
14 both Luxpro's defamation and trade libel claims because Luxpro failed to specifically identify
15 any disparaging statements made by Apple. *Luxpro*, 658 F. Supp. 2d at 935. That court also
16 concluded Luxpro did not state a claim for trade libel because Luxpro did not adequately plead
17 special damages. *Id.* at 936.18 **1. Luxpro States a Claim for “Business” Defamation.**19 Apple argues that Luxpro has not cured the deficiencies in the FAC because it fails to
20 specifically identify any alleged disparaging statements. In the Ninth Circuit, a claim for
21 product defamation or trade libel must “be based on specific statements, and ‘[t]he defamatory
22 character of the language must be apparent from the words themselves.’” *Films of Distinction,*
23 *Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1081 n.8 (C.D. Cal. 1998) (quoting *Auvil*
24 *v. CBS “60 Minutes,”* 67 F.3d 816, 822 (9th Cir. 1995)). While the exact words do not need to
25 be stated, the substance of the defamatory statement must be alleged. *Silicon Knights, Inc. v.*26
27 ⁵ Commercial disparagement is also known as trade libel, product
28 disparagement, or slander of goods. *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057 (9th
 Cir. 1990); Prosser and Keeton on Torts § 128 (5th ed 1984).

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1 *Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1314 (N.D. Cal. 1997) (citing *Okun v. Superior*
2 *Court (Maple Properties)*, 29 Cal. 3d 442, 458 (1981)).

3 Luxpro has cured the deficiencies in the FAC by specifically identifying the allegedly
4 disparaging statements that Apple made. Luxpro claims that Apple informed Luxpro's various
5 commercial partners that Luxpro's products were "cheap 'knock-offs,'" "cheap copies," and
6 "illegal copies" of Apple's iPod products. (SAC ¶ 48.) These claims are specific enough to
7 allege the substance of Apple's disparaging statements. *See, e.g., Kovesdy v. Kovesdy*, 2010
8 WL 3619826, at *4 (N.D. Cal. Sept. 13, 2010) (denying motion to dismiss where defendant
9 characterized plaintiff as being "unqualified," uncertified," and "unprofessional"). Therefore,
10 the Court finds that Luxpro has cured this defect and sufficiently identifies the substance of the
11 allegedly disparaging statements.

12 With respect to the remaining requirements for a defamation claim, Luxpro alleges
13 sufficient facts to state a cause of action for defamation. Under California law, "[t]he tort of
14 defamation exists whenever a false and unprivileged statement which has a natural tendency to
15 injure or which causes special damage is communicated to one or more persons who understand
16 its defamatory meaning and its application to the injured party." *Isuzu Motors Ltd. v.*
17 *Consumers Union of U.S., Inc.*, 66 F. Supp. 2d 1117, 1122 (C.D. Cal. 1999) (internal quotation
18 omitted). To prevail on a state law defamation claim, a plaintiff must show that the challenged
19 statement "'impl[ies] an assertion of objective fact.'" *Unelko Corp. v. Rooney*, 912 F.2d 1049,
20 1053 (9th Cir. 1990) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)) (brackets
21 as in *Unelko*). Luxpro alleges that Apple published false statements about Luxpro's business,
22 practices, and products. Apple's alleged statements that Luxpro's products were "cheap
23 'knock-offs,'" "cheap copies," and "illegal copies" of Apple's iPod products imply an assertion
24 of objective fact. *See Maponics, LLC v. Wahl*, 2008 WL 2788282, at *3-*4 (N.D. Cal. 2008)
25 (concluding that emails sent to counterclaimant's customers allegedly stating that the
26 counterclaimants stole counterdefendant's data and infringed its copyright implied a false
27 assertion of fact). Therefore, the Court concludes that Luxpro states a claim for defamation.

28 Accordingly, the Court denies, in part, Apple's motion to dismiss on this basis.

1 **2. Luxpro Fails to State a Claim for Trade Libel.**

2 Apple argues that Luxpro's claim for trade libel fails because Luxpro has not alleged
3 special damages. A cause of action for trade libel requires (1) a publication, (2) which induces
4 others not to deal with plaintiff, and (3) special damages. *See Aetna Cas. & Sur. Co., Inc. v.*
5 *Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988). To succeed on a claim for trade libel, a
6 plaintiff must plead and prove special damages in the form of pecuniary loss. *Luxpro*, 658 F.
7 Supp. 2d at 935 (citing *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d
8 1035, 1047 (C.D. Cal. 1998)). Under Rule 9(g), “[i]f an item of special damage is claimed, it
9 must be specifically stated.” Fed. R. Civ. P. 9(g). Although a plaintiff does not need to plead a
10 specific dollar amount, the plaintiff should allege an “established business, the amount of sales
11 for a substantial period preceding the publication, the amount of sales subsequent to the
12 publication, [and] facts showing that such loss in sales were the natural and probable result of
13 such publication.”” *Luxpro*, 658 F. Supp. 2d at 935 (quoting *Isuzu Motors*, 12 F. Supp. 2d at
14 1047).

15 In the SAC, Luxpro lists its revenues from sales made prior to Apple's alleged
16 interference, but Luxpro does not state any specific facts about losses in sales after Apple took
17 these actions. Luxpro states generally that it suffered economic loss, including “loss of valuable
18 goodwill,” “lost business profits (past, present, and future), [and] loss of working capital and the
19 ability to secure additional capital.” (SAC ¶ 90.) However, Luxpro's general statements of
20 economic loss do not sufficiently identify special damages. *See Isuzu Motors*, 12 F. Supp. 2d at
21 1047 (finding a claim for special damages from “the loss of revenue from wholesale and retail
22 sales of [plaintiff]” inadequate). Therefore, the Court dismisses Luxpro's trade libel claim.

23 Accordingly, the Court grants, in part, Apple's motion to dismiss on this basis.
24 However, because the Court cannot say it would be futile to grant leave to amend, the Court
25 grants Luxpro one final opportunity to amend its trade libel claim.

26 **H. Luxpro States a Claim Under Section 17200.**

27 Apple argues that Luxpro fails to state a claim under Section 17200. Section 17200
28 prohibits unfair competition, including “any unlawful, unfair or fraudulent business act or

1 practice.” Cal. Bus. & Prof. Code § 17200. Unfair competition includes “anything that can
2 properly be called a business practice and that at the same time is forbidden by law.” *Luxpro*,
3 658 F. Supp. 2d at 936 (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular*
4 *Telephone Co.*, 20 Cal. 4th 163, 180 (Cal. 1999)). An action based on Section 17200 “borrows”
5 violations of other laws and treats them as unlawful practices. *Chabner v. United Omaha Life*
6 *Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000).

7 The “unlawful” prong of Section 17200 prohibits “any practices forbidden by law, be it
8 civil criminal, federal, state, or municipal, statutory, regulatory, or court-made.” *Saunders v.*
9 *Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994) (internal quotation omitted). Because the
10 Court has concluded that Luxpro states a claim for defamation, Luxpro’s defamation claim may
11 serve as the basis for its Section 17200 claim. See *Johnson v. JP Morgan Chase Bank DBA*
12 *Chase Manhattan*, 536 F. Supp. 2d 1207, 1213 (E.D. Cal. 2008) (denying a motion to dismiss a
13 Section 17200 claim based on a sufficient state and federal claims, including a claim for
14 defamation); *Maponics*, 2008 WL 2788282, at *3 (denying a motion to dismiss a Section 17200
15 counterclaim based on state law tort counterclaims of defamation and tortious interference).
16 Therefore, the Court concludes that Luxpro states a claim under the “unlawful” prong of
17 Section 17200.

18 Accordingly, the Court denies, in part, Apple’s motion to dismiss on this basis. The
19 Court’s ruling is without prejudice to Apple renewing its arguments regarding the “unfair” and
20 “fraudulent prongs” in a subsequent motion to dismiss, if Luxpro chooses to file a Third
21 Amended Complaint, or on a motion for summary judgment.

22 CONCLUSION

23 For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART
24 Apple’s motion to dismiss and GRANTS Luxpro one final opportunity to amend. If Luxpro
25 chooses to amend, it shall file its Third Amended Complaint by no later than April 8, 2011.
26 //

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28

1 It is FURTHER ORDERED that the initial Case Management Conference shall be
2 continued from April 1, 2011 to April 22, 2011. The parties' Joint Case Management
3 Conference Statement shall be due on April 15, 2011.

4 **IT IS SO ORDERED.**

5
6 Dated: March 24, 2011

Jeffrey S. White
7

JEFFREY S. WHITE
8 UNITED STATES DISTRICT JUDGE